IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 14, 2008

STATE OF TENNESSEE v. JOHNNY S. HUDGINS

Direct Appeal from the Circuit Court for Wayne County
No. 13684 Stella L. Hargrove, Judge

No. M2007-01504-CCA-R3-CD - Filed July 15, 2008

A Wayne County jury found the Defendant, Johnny S. Hudgins, guilty of two counts of rape of a child, and the trial court sentenced him to an effective sentence of twenty-five years in prison. On appeal, the Defendant claims: (1) the trial court erred by admitting the Defendant's pre-arrest statement; (2) the trial court erred in letting a witness testify about statements made by the victim; and (3) the State presented insufficient evidence to support his convictions. After a thorough review of the record and the applicable law, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS, JR., JJ., joined.

Robert D. Massey (at trial) and Kyle E. Dodd (on appeal), Pulaski, Tennessee, for the Appellant, Johnny S. Hudgins.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Jennifer L. Bledsoe, Assistant Attorney General; Mike Bottoms, District Attorney General; J. Douglas Dicus, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Suppression Hearing

A Wayne County Grand Jury indicted the Defendant on two counts of rape of a child. Before the Defendant's trial, the trial court held a suppression hearing to rule on the Defendant's motion to suppress his pre-arrest statement to the police. At that hearing, the following evidence was

presented: Officer Tommy Workman, a criminal investigator for the District Attorney General's Office, testified that he and Susan Franks of the Department of Children's Services interviewed the Defendant at the local court house. Officer Workman said he read the Defendant his *Miranda* warnings. Then, Officer Workman and the Defendant both signed the form saying the Defendant had been apprised of his rights, and Susan Franks signed as a witness. The Defendant gave his statement, which Officer Workman transcribed. As the Defendant spoke, Officer Workman would write a few sentences, then read them back to the Defendant for verification, and then the Defendant would continue speaking. Upon completing the statement, the Defendant was given his complete statement to read and change, if necessary. The Defendant's statement reads:

> M.T.[1] started it. He grabbed my dick [and] it started from there. I had oral sex with him [and] he performed oral on me. With K.S. I put my dick between her legs [and] rubbed up [and] down. I don't think I penetrated her but I might have. With J.T. I did the same thing I did to K.S. I don't know whether I penetrated her or not. My wife Tina would be in the house asleep when this was going on. It happened probably twice. This happened probably in May 2004. I felt bad doing it. I don't know why I did it but I felt bad about it. I was done that way when I was growing up. Maybe I need help. I don't know of anything else to say.

Officer Workman said the Defendant did not make any changes to his transcribed statement. Officer Workman also said that the Defendant was not made any promises in order to persuade him to tell the truth. Moreover, he described the Defendant as cooperative and communicating in an "intelligible way."

On cross-examination, Officer Workman said the Defendant arrived at the courthouse voluntarily around 11:00 a.m.. Officer Workman began the interview at 11:40 a.m. and it ended at 12:15 p.m. Officer Workman said he and Franks did not record the session in any manner, and they did not explicitly tell the Defendant that he was a suspect in their investigation. He said the Defendant sat by the door and was free to leave at any time, although this was never communicated to the Defendant. Officer Workman did say that Franks "asked [the Defendant] to come [to the courthouse], and then asked him to come into the [grand jury] room where I was," in order to give the impression to the Defendant that he could "get up and walk out." In the interview, Officer Workman did not ask the Defendant his age or experience with the criminal justice system. He also did not question the Defendant about his education or health. After reading the Defendant his rights, Officer Workman told the Defendant what K.S. and J.T. told him. At that point, the Defendant said something like, "I'm not going to the penitentiary," and Officer Workman responded, "That wouldn't be up to me." The Defendant then began giving his statement. Officer Workman admitted that he "attempt[ed] to ask questions in such a way that [the Defendant's] answer might satisfy the sexual gratification portion of the definition of the alleged crime." After the Defendant said he had nothing more to say, Officer Workman gave the statement to the Defendant to read, and the Defendant said that he "understood." Officer Workman testified that he told the Defendant that he

[1] For the privacy of the child victims, we will refer to them by their initials.

was still not under arrest but that he would use the statement as proof at the grand jury.

Susan Franks of the Department of Children's Services testified that she participated as a "co-interviewer" of the Defendant with Officer Workman. She said the Defendant cooperated and willingly came to the courthouse. After introductions were made, Officer Workman read the Defendant his rights, which the Defendant acknowledged and waived by signing a waiver of rights form. The Defendant initially said, "I didn't do anything," but then he said, "Well, I might as well tell the truth." Franks described the change in the Defendant's stance as "instantaneous." The Defendant wanted to know what the children said, and, after hearing that, he decided to give his statement. Franks said that, at some point in the interview, they began to ask the Defendant about the charges he faced in Florida. Franks said she never accused the Defendant of not telling the truth.

After hearing this evidence and the subsequent arguments made by each side, the trial court denied the Defendant's motion to suppress his statement.

B. Trial

At trial, the following evidence was presented: Susan Franks of the Department of Children's Services testified that she received a referral alleging sex abuse of a child on November 15, 2004. She began her investigation by interviewing the victim, K.S. She also helped interview the Defendant with Officer Workman, an investigator at the District Attorney General's Office. The Defendant was read his rights, and he waived them. He then gave a statement, which Officer Workman transcribed.[2] After the Defendant finished giving his statement, Officer Workman read the entire statement to him; the Defendant could make any changes, but chose not to make any. The Defendant then read the statement himself and signed it.

On cross-examination, Franks testified that the Defendant initially denied doing anything to the children. She admitted that when she interviewed the Defendant's wife and victims M.T. and J.T., they all denied anything happened. Franks said that she formally interviewed K.S. twice and has talked to her other times. Additionally, she talked with K.S.'s school before interviewing K.S. to find out her verbal limitations. Franks stated that she gave the Defendant's wife, Tina Hudgins, and K.S.'s parents forms relating to criminal injury compensation. She also asked Tina Hudgins, the mother of M.T. and J.T., to take them to a counseling center specifically for children who have been sexually abused. Franks said she advised Hudgins that J.T. did not need to be physically examined "because it was not acute rape, [and] that there would be no evidence found."

On redirect-examination, Franks said the Defendant was cooperative, and he appeared coherent. She said, "he seemed like he always did," referring to the Defendant. She also said that J.T. and M.T. lived in the Defendant's home with their mother, Tina Hudgins. Franks stated that J.T. originally admitted to her some sexual abuse by the Defendant, but had since denied it. Franks said there is some concern that K.S. gained sexual knowledge from watching pornography on her

[2] The Defendant's statement is included in the suppression hearing section of this opinion.

brother's computer. However, K.S. "denied that she had ever seen anything on [his] computer, or any pornographic movies at her house. And she said that [the Defendant] did it." Franks insisted that K.S. has been consistent with her story.

Missy Sisk, K.S.'s special education teacher, testified that K.S. is certified as mentally retarded. She said that, while K.S. is twelve years old, she functions at an eight-year-old's level. Sisk also said, "For a fifth grade student, she was very immature. She's a good student. She listens well. She does function, you know, at a lower level than most fifth grade students. Very honest little girl. Never gives you any behavior problems."

Debbie Sherill testified that she has three step-children and one biological child, K.S. K.S. was eleven years old when the events happened in this case. The Defendant is married to Sherill's sister, making him K.S.'s uncle. K.S. had a close relationship with her aunt, uncle, and cousins, and she spent weekends at their house. Sherill said K.S. receives treatment for attention deficit hyperactivity disorder at Centerstone, a mental health facility. She also explained that K.S. contracted a serious virus when she was very young, and, since then, K.S. has been mentally impaired.

On cross-examination, Sherill testified that her husband, Joe Sherill, has three children by a previous marriage, including a nineteen-year-old son named Daniel. Daniel lived with them for a time, and he subscribed to many pornographic internet sites. Sherill does not think K.S. saw the websites or any of Daniel's other pornographic material. Brandi Staggs, Sherill's biological daughter, but adopted sister, told Sherill that she found a pair of her underwear hidden under a couch or chair, and Daniel had masturbated into the underwear. Sherill admitted that someone previously accused her husband of sexual abuse.

K.S. testified that, around the time of the molestation, she visited the Defendant, Hudgins, J.T., and M.T. nearly every weekend. She said the Defendant touched her in his bedroom, the living room, and J.T.'s bedroom. She said it happened "[a] lot[;] . . . about a hundred times." Describing the Defendant's actions in general, she said, "He would, like, touch me on my private part, my 'mookie' and my butt," with "mookie" referring to her vagina. Continuing, she said, the Defendant would touch her with "sometimes a finger and sometimes his hands" and then sometimes he would touch her with "his wiener." K.S. described the Defendant's penis, saying, "sometimes it was big and sometimes it was small," also, one time "white and yellow stuff" came from his penis. "He told [J.T.] to go get his towel," and J.T. cleaned up the mess. K.S. said the Defendant would "sometimes rub up against me, and sometimes put [his penis] inside." She said his penis would go inside her "just a little bit."

K.S. then described two particular incidents of touching that happened in the living room and in J.T.'s room. She recounted, "I was probably watching cartoons or westerns, and he came in there and put his hand in my private part – my front private part, and he would rub it and stick his finger in my front private part." She clarified that his hand was "under [her] clothing." Speaking of the incident in J.T.'s room, K.S. recalled, "[J.T.] was playing Nintendo and I asked her if I could play."

The girls then began talking about how they wanted to be teachers, at which point, the Defendant came and "got up on the bed." She said, "I think he stuck his finger in me."

K.S. said she initially did not tell anyone about this touching because "[she] was trying to protect [her] baby niece and [she] was scared." She said, "[Bec]ause I'm afraid he was going to do it to her when she got older, and I didn't want that to happen."

On cross-examination, K.S. had trouble identifying how many months are in a year and how many days in a month. She said she can count to "about a hundred and sometimes five." When asked if she meant five hundred, she said, "no just five." K.S. denied ever looking at "sex stuff," which she described as "about girls with their clothes off or boys with their clothes off," on Daniel's computer. K.S. said she saw the Defendant touch J.T. and M.T., and they saw him touch her.

Officer Tommy Workman, a criminal investigator with the District Attorney General's Office, testified that the Department of Children's Services referred him this case. He interviewed the children first, then their parents, and finally the Defendant. When he interviewed the Defendant, Franks was there, and the Defendant came to the interview voluntarily. Officer Workman said he "advised [the Defendant] of the allegations made against him by the children." The Defendant then said, "I'm not going to jail" and gave his statement. Officer Workman described the method he used to take the Defendant's statement: "Well, I asked him that question," referring to the question about what the Defendant could tell them about the allegations, "and then, when he answered, I started writing down what he said. And every so often, I would stop and read it back to him, and ask him, now is this exactly what you said. If it's not, I'll change it." Officer Workman said the Defendant did not want to change anything and signed the statement. Regarding the Defendant's ability to understand what was happening, Officer Workman said he "didn't have any problem, at all."

On cross-examination, Officer Workman said he did not tell the Defendant that he was free to leave. He also did not record any part of the interview or ask the Defendant about his education and health. He said Franks may have initially told the Defendant she thought he was lying. Officer Workman admitted there was no physical evidence of the crime.

For the Defendant, Tina Hudgins, the Defendant's wife and the mother of J.T. and M.T., testified that K.S. never stayed the night at her house in April and May 2004. Tina Hudgins said Joe Cornwall, a family friend, stayed overnight often for the weekends. She also said Franks talked to her children and suggested they receive treatment at Kid's Place. Feeling that Franks was "harassing" them, the family got the children a lawyer. Tina Hudgins was adamant that neither J.T. nor M.T. ever said the Defendant sexually abused them.

On cross-examination, Tina Hudgins stated she does not believe her husband committed these crimes. She said K.S., J.T., and M.T. are all in special education classes. She also said "My husband and children [were] with me . . . 100 percent of the time in April and May." Tina Hudgins then admitted that J.T. somewhat revealed that the Defendant might have touched her inappropriately. Tina Hudgins said her husband cannot read and likely did not understand the

statement he gave.

J.T. testified that she was thirteen years old at the time of trial. She said that she never saw the Defendant give K.S. or M.T. a "bad touch." She also said the Defendant never gave her a "bad touch." J.T. denied ever telling anyone the Defendant touched in her a bad way. On cross-examination, J.T. said K.S. would play at her house and sometimes spend the night. She does not know whether K.S. is older or younger than her.

Daniel Sherill, step-brother of K.S., testified that he is nineteen years old, and he owns pornography. He said K.S. never saw the pornography, whether in magazines or on the internet. He said K.S. talks about sex to Tina Hudgins, his step-mother. At first K.S. talked about what the Defendant did to her, but then it later became other topics. He admitted that he was caught using Staggs's underwear to masturbate and stuffing it under the couch. He said K.S. was not around for that incident.

Brandi Staggs, Tina Hudgins's biological child, who had been adopted by Tina Hudgins's parents, testified that she was twenty-one years old and lived near K.S. She saw K.S. watching Daniel watch pornography on the internet. She also caught K.S. looking at pornography in Daniel's room. Additionally, Staggs said K.S. could hear her confront Daniel about masturbating with her underwear.

The Defendant testified that he cannot read or write "a lot" and that he only finished the ninth grade. He said he never showed pornography to K.S. on the computer and did not touch any of the children in inappropriate places. The Defendant said he met Franks and Officer Workman to give his statement, and he said he told them nothing happened. He stated that Franks told him they knew he was not telling the truth. Then, he heard the allegations from J.T., but not from K.S. or M.T. The Defendant testified that he was never told he could leave and did not feel free to leave. He said he signed his name to the statement, but he could not read it and he does not remember having the statement read back to him. The Defendant also denied all facts in the statement, and he admitted that he does not know the definition of "penetrated."

On cross-examination, the Defendant testified that he did not remember the waiver of rights language on the document he signed. He said he did listen to and understand his rights, though. The Defendant related that, when he finished giving his statement, Franks and Officer Workman placed it in front of him and told him to sign it, which he did despite not understanding it. He thought it included his "I did not do it" statement. The Defendant continued stressing that he could not read.

Joseph Lewis Cornwall, the Defendant's family friend, testified he spent nearly every weekend at the Defendant's house. He said K.S. never spent the weekend at that house in April or May 2004. He never saw the Defendant touch J.T. or M.T. inappropriately, and he never saw the Defendant interact with K.S. On cross-examination, Cornwall said he spent the weekends at their house for a total of a year and five months, but he would leave their house on Sunday.

M.T., the Defendant's step-son, testified that the Defendant does not use the computer and cannot read or write. M.T.'s cousin is K.S., and he has been around K.S. when she watched an X-rated tape. He said the Defendant never touched him inappropriately, and he never saw the Defendant touch either J.T. or K.S. inappropriately. On cross-examination, M.T. said K.S. would visit their house only about once a month.

After hearing this proof, the jury convicted the Defendant of two counts of rape of a child. The trial court sentenced him to an effective sentence of twenty-five years. It is from these judgments the Defendant now appeals.

II. Analysis

On appeal, the Defendant raises three issues: (1) the trial court erred by admitting the Defendant's pre-arrest statement; (2) the trial court erred in letting a witness testify about statements made by the victim; and (3) the State presented insufficient evidence to support the verdict.

A. Admission of Defendant's Statement

The Defendant argues the trial court erred when it admitted the Defendant's statement because, when the circumstances are taken as a whole, they show the Defendant did not understand what he was doing when he made his statement. The State argues that the Defendant was read his *Miranda* rights, chose to waive them, and knowingly gave a statement, which he then signed.

When issuing its ruling, the trial court did not elaborate on its decision, but merely said, "Of course, the State has the burden of proving by a preponderance of the evidence that the defendant's confession should be – [was] voluntarily, knowingly, and intelligently made. And the Court finds that the State has carried its burden of proof."

In Tennessee, when a defendant brings a claim that his statement should be suppressed due to it not being knowingly and voluntarily given, this Court reviews the facts while giving great deference to the suppression hearing judge. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). The application of law to fact is reviewed de novo. *State v. Bridges*, 963 S.W.2d 487 (Tenn. 1997). The findings of the trial court will be upheld unless the evidence preponderates otherwise. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

A defendant's statement is subject to suppression if the defendant gave the statement while being interrogated and in custody, and the defendant was either not told of his rights to remain silent and to an attorney, or he waived those rights unknowingly, involuntarily, or unintelligently. *Miranda v. Arizona*, 384 U.S. 436 (1966). Once a defendant is in custody and is being interrogated by the police, he is entitled to be advised of his rights. *Id.* Factors that help determine whether the defendant was in custody are

> the time and location of the interrogation; the duration and character of the

> questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

State v. Walton, 41 S.W.3d 75, 82-83 (Tenn. 2001) (citing *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn.1996)). To adequately waive his rights to be silent and to have an attorney present, the defendant must "voluntarily, knowingly, and intelligently" waive them. *Miranda*, 384 U.S. at 479. In *State v. John Philip Noland* we held, "[I]lliteracy, mental disability, and educational background . . . do not, in and of themselves, render the appellant's statement involuntary." No. E2000-00323-CCA-R3-CD, 2000 WL 1100327, at *6 (Tenn. Crim. App., at Knoxville, Aug. 3, 2000) (citing *State v. Perry*, 13 S.W.3d 724, 728 (Tenn. Crim. App. 1999)), *perm. app. denied* (Tenn. Feb. 20, 2001). When the issue of voluntariness is raised on appeal, this court reviews the totality of the circumstances. *State v. Bush*, 942 S.W.2d 489, 500 (Tenn. 1997).

We first conclude the Defendant was not in custody when he made his statement. Facts supporting that the Defendant was not in custody include: the interview only lasted thirty-five minutes; the Defendant drove himself to the courthouse; the interview was conducted at the grand jury room at the local courthouse; the Defendant was never restrained in any fashion; the Defendant entered the interviewing room with Franks, who then introduced him to Officer Workman; the Defendant sat by the door, with Officer Workman and Franks behind a table and facing him; and the Defendant was told after he gave his statement that he was not under arrest. The only fact supporting that the Defendant was in custody was that he was not informed he could leave at any time. The "not in custody" facts greatly outweigh the "in custody" fact. Therefore, the Defendant issued his statement while not in custody, which makes the statement admissible.

Furthermore, even were we to conclude that the Defendant was in custody at the time he gave his statement, he knowingly and voluntarily waived his *Miranda* rights. The Defendant claims he did not understand his rights and that his inability to read hindered his ability to waive his rights. We initially point out that, while being cross-examined, the Defendant admitted that he understood his rights when they were read to him. Also, Officer Workman and Susan Franks both testified that Officer Workman read the Defendant his rights. The Defendant then signed the waiver form. Even though the Defendant may not have finished high school, may be illiterate, and may have learning disabilities, these facts taken with all the other circumstances do not preponderate against the evidence that the Defendant voluntarily, knowingly, and intelligently waived his right to remain silent and issued a statement. The Defendant is not entitled to relief on this issue.

B. Admission of Victim's Statement

The Defendant also argues on appeal that the trial court erred when it admitted into evidence the victim's statement to Susan Franks as part of Susan Franks's testimony. The State admits that the statement is hearsay, but it counters that the Defendant opened the door to the statement when he cross-examined Franks.

Initially, the Defendant elicited the following testimony from Franks on cross-examination concerning exposure of K.S. to pornography:

> **Q (Defendant Counsel):** So based on that interview, you were also told, were you not, of the possibility of [K.S.] being exposed to potential adult-oriented material via Daniel Sherill, were you not?
>
> **A (Franks):** On 11/15?
>
> **Q:** On any of – on any of your first or second interviews with either Tina [Hudgins or the Defendant], were you told that, potentially, [K.S.] could have been exposed to adult-oriented-type material via Daniel Sherrill?
>
> **A:** Eventually.

The State did not object to this testimony.

Then, on redirect examination, the State asked Franks whether she questioned K.S. about seeing pornographic material on her brother's computer. Franks said yes, and then relayed what K.S. had told her:

> **Q (The State):** There [were] some questions that Mr. Massey [the Defense Counsel] was asking you concerning pornographic materials, if I understood where he was trying to go with that. Did you ask [K.S.] about seeing pornographic material?
>
> **A (Franks):** I certainly did. That was one of my things, because Mrs. Hudgins had said that she thought that might be where [K.S.] got that. And I tried my best, the very first interview with [K.S.], to see if that was where she got that. . . . But no matter how much I tried –
>
> **Defense Counsel:** Objection. She's fixing to testify as to hearsay, Your Honor. She –
>
> **The State:** Judge, he opened the door. He asked specific questions about her interview with [K.S].
>
> . . . .

The Court: I'm going to allow it.

A (Franks): No matter how much I tried, I could get – not get her to . . . she denied that she had ever seen anything on Daniel's computer, or any pornographic movies at her house. And she said that [the Defendant] did it. [The Defendant] did it. And [the Defendant] did it. That she had never seen anything on Daniel–

The admission of evidence is largely discretionary, and the trial court's discretion will not be disturbed on appeal unless there has been clear abuse. *State v. Harris*, 30 S.W.3d 345, 350 (Tenn. Crim. App. 1999). Generally, "all relevant evidence is admissible" unless a particular constitutional provision, statute, or rule excludes it. Tenn. R. Evid. 402. Evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Hearsay evidence is one type of evidence that the rules categorically do not admit. A hearsay statement is an out-of-court statement offered in court for the truth of the matter asserted, and specifically, such statements are "not admissible except as provided by [the] rules [of evidence] or otherwise by law." Tenn. R. Evid. 801, 802. Various exceptions to the inadmissibility of hearsay rule exist. *See* Tenn. R. Evid. 803, 804. On review, we conclude the testimony elicited by the State with regards to what the victim said to the witness is hearsay and does not fall under one of the exceptions. The statement by the victim that she did not watch pornography on Daniel Sherill's computer was said out of court to Franks. The statement was offered by Franks for the truth that the victim, in fact, did not watch pornography on her brother's computer. Thus, the statement is hearsay. We cannot find any exception to the hearsay rule that would permit admission of the statement. As such, the trial court should not have permitted it.

The State argues that the Defendant opened the door to this hearsay statement by Franks when it elicited the hearsay response she gave on cross-examination concerning whether the Defendant or Hudgins saw the victim watch pornography. We find the State's argument unpersuasive and differentiate this case from the one upon which it relies. The State relies on *State v. Robinson*, 146 S.W.3d 469, 493 (Tenn. 2004), which held:

> While the defendant may very well be correct that both *Crawford* and Tennessee Rule of Evidence Rule 803(1.1) bar hearsay statements of identification if the declarant does not testify at trial, neither *Crawfor*d nor Rule 803(1.1) is dispositive in this case because the defendant himself both elicited and opened the door to the testimony he now assigns as error. Under these circumstances, the defendant is not entitled to relief. Indeed, it is well-settled that a litigant "will not be permitted to take advantage of errors which he himself committed, or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect or misconduct." *Norris v. Richards*, 193 Tenn. 450, 246 S.W.2d 81, 85 (1952); *see also State v. Smith*, 24 S.W.3d 274, 279-80 (Tenn.2000); Tenn. R. App. P. 36(a). Thus,

the defendant is not entitled to relief on this claim.

Id. (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). In *Robinson*, a police officer testified on cross-examination that two specific people had identified the defendant's photo in a police photo spread. The question was, "So out of all the people that - when they were shown this photo spread by officers in your department that identified Gregory Robinson [the defendant in that case] during the course of your investigation the only two were Christopher James and . . . Shaun Lewis-James?" The officer answered, "That's what we've got in their statements, correct." Then, on redirect, the police officer "testified that, while giving a statement . . . Shaun Washington looked at [the same] photographic array . . . and identified the defendant. . . ." Thus, the same person, the officer, was testifying about what the same person, Shaun Washington, said when identifying the defendant's picture in a photo array. In our case, Franks testified on cross-examination to what the victim's mother and the Defendant said, but on redirect examination, she testified about what the victim told her. While the issue of whether the victim viewed pornography on her brother's computer was the central subject, the individuals about whom Franks testified changed. The continuity present in *Robinson* of the hearsay being of the same person and of the same topic is not present in this case. We fail to see how the Defendant elicited testimony about what the victim told Franks when he asked what the victim's mother and the Defendant told Franks. In effect, the hearsay involved two separate "doors": one for statements made by Hudgins and the Defendant and one for statements made by the victim. With that inconsistency between the cross- and redirect examinations, we fail to see how the Defendant opened the door to admit the testimony about what the victim told Franks.

While we conclude the statement was hearsay and should not have been admitted, we nonetheless conclude the error was harmless. "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice in the judicial process." Tenn. R. App. P. 36. Daniel Sherill, Brandi Staggs, and M.T. all testified that the victim viewed Sherill's pornography. The victim herself testified she did not watch Sherill's pornography. Thus, Frank's testimony was cumulative, and the Defendant has failed to prove that the admission more probably than not affected the judgment or resulted in prejudice. *See generally State v. Rodriguez*, – S.W.3d –, 2008 WL 1817361 (Tenn. 2008). Therefore, any error in permitting the hearsay statement is harmless, and the Defendant is not entitled to relief on this issue.

C. Sufficiency of the Evidence

The Defendant claims there was insufficient evidence to support his convictions for two counts of rape of a child. The State argues that the testimony of the victim and the Defendant's sworn written statement support the convictions.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v.*

Goodwin, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

"Rape of a child is the unlawful sexual penetration of a victim by the defendant . . . if the victim is more than three (3) years of age but less than thirteen (13) years of age." T.C.A. § 39-13-522 (2006). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body." T.C.A. § 39-13-501 (2006). In this case, the victim testified that the Defendant inserted his finger in her vagina once in the living room and once in J.T.'s bedroom. The State elected to have the jury consider those two incidents when rendering its verdict. Reviewing the facts, we conclude there is sufficient evidence that, on two occasions the Defendant, an adult, sexually penetrated K.S., who was eleven years old at the time. As such, the Defendant is not entitled to relief on his claim of insufficient evidence.

III. Conclusion

After a thorough review of the evidence and applicable law, we conclude that the trial court correctly admitted the Defendant's statement into evidence; the trial court erroneously allowed hearsay evidence, consisting of a portion of the victim's statement, to be introduced by the State during the cross-examination of Susan Franks, but that the error was harmless; and the evidence sufficiently supports the Defendant's convictions. We affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE